IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE PIUS C.KURIAKOSE

FRIDAY, THE 6TH JULY 2007 / 15TH ASHADHA 1929

WP(C).No. 28806 of 2005(D)

AGAINST THE ORDER IN IA 2217 2004 IN OS.611/2001 of MUNSIFF COURT, KARUNAGAPPALLY

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PETITIONERS:

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1. N. THANKAPPAN, KOTTAKKAKATHU VEEDU, THODIYOOR MURI, THODIYOOR VILLAGE, KOLLAM.

2. R. RAGHAVAN, S/O. ACHUTHAN, `SHEELALAYAM', THODIYOOR MURI, THODIYOOR VILLAGE, KOLLAM.

3. M. HAMEEDKUTTY, KOICHERY VEEDU, THODYUR MURI, THODIYUR VILLAGE, KOLLAM.

BY ADV. SRI.N.K.SUBRAMANIAN

RESPONDENT:

AJAYAKUMAR, S/O. PEETHAMBARAN NAIR, KURUMBALATH KIZHAKKETHIL VEETTIL, PADANAYAR KULANGARA, THEKKUM MURI, AYANIVELIKULANGAR VILLAGE, KARUNAAGAPPALLY TALUK, KOLLAM DISTRICT, REP. BY POWER OF ATTORNEY HOLDER JANARDANAN PILLAI, S/O.KRISHNA PILLAI, VELLYATH PUTHEN VEETTIL, PULIYUR VANCHI THEKKUM MURI, THODIYUR VILLAGE, KARUNAGAPPALLY TALUK, KOLLAM DISTRICT.

BY ADV. SRI.K.ABDUL JAWAD

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON 06/07/2007,THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

WPC.NO.28806/2005 D

APPENDIX

PETITIONER'S EXHIBITS:

EXT.P1: COPY OF INTERIM ORDER IN WP(C) NO.22577/2004 DTD. 2/08/04.

EXT.P2; COPY OF COUNTER CLAIM IN O.S.611/01 M.C. KARUNAGAPPALLY.

EXT.P3: COPY OF I.A.2217/04 IN O.S.611/01.

EXT.P4: COPY OF ORDER IN I.A.NO.2217/04 DTD.23/06/2005.

/TRUE COPY/

KSS

PIUS C. KURIAKOSE,J.

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W.P.(C) No.28806 of 2005

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Dated: 6th July, 2007

JUDGMENT

In a suit for fixation of boundary the defendants raised a counter claim. The counter claim was that a decree of declaration be passed in respect of the property scheduled to the counter claim. The learned Munsiff under Ext.P4 impugned order dismissed the application for leave on the ground that it is highly belated and also that there was an earlier suit between the parties in respect of the very same relief sought for. However ultimately the learned Munsiff observed that the plaintiff will have the liberty to file a fresh suit if the cause of action survives. Even though Mr.N.K.Subramanian, learned counsel for the petitioners would cite various decisions before me to support his argument that the court has power to admit even counter claims which are not filed along with the written statement, I am of the view that the question of limitation of a counter claim will have to be decided on the basis of Section 3(2) of the Indian Limitation Act. In other words, the question whether the counter claim is barred will have to be decided with reference to the date on which counter claim was filed. Under these circumstances, I do not propose to interfere with Ext.P4 order. But at the same time, I permit the petitioner to file

a fresh suit within three weeks of receiving a copy of this judgment. If it is so done, the time taken by the petitioner during the period from 10.12.2004 (the date on which the counter claim was actually filed) and till the date of institution of the suit will be excluded by the court in which a fresh suit is filed under Section 14 of the Act for the purpose of limitation. It is open to that court to consider all questions arising on the basis of the pleadings raised by the respondents including the question whether the suit is barred by limitation or barred by principles of res judicata .

srd **PIUS C.KURIAKOSE, JUDGE**